

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1036

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In The
United States Court of Appeals
For the Second Circuit

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

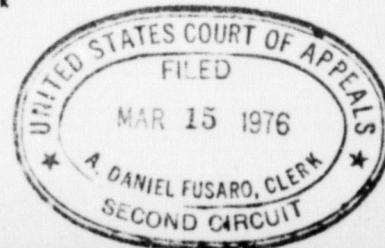
vs.

FREDERICO G. RANDACCIO,
Defendant-Appellant.

APPENDIX

APPEAL FROM ORDER OF
RE-SENTENCE DENYING RELIEF REQUESTED
PURSUANT TO 28 USC 2255

HAROLD J. BOREANAZ
Attorney for Defendant-Appellant
736 Brisbane Building
Buffalo, New York 14203



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NOTICE OF MOTION AND AFFIDAVIT
PURSUANT TO 28 USC 2255,
SEPTEMBER 6, 1975

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

Indictment #1967-115

FREDERICO G. RANDACCIO

SIRS:

PLEASE TAKE NOTICE, that upon the judgment of conviction and all prior proceedings had and filed herein, and upon the annexed affidavit of his counsel, HAROLD J. BOREANAZ, the defendant, FREDERICO G. RANDACCIO, will, on the 10th day of November, 1975, at 10:00 o'clock in the forenoon thereof, apply to the United States District Court of New York at the United States Courthouse at Buffalo, New York, Part I, for an order pursuant to Title 28 U.S.C. 2255, vacating the sentence imposed upon defendant on the ground that the original sentence imposed was contrary to law.

Dated: September 6th, 1975
Buffalo, New York

Yours, etc.
Harold J. Boreanaz
HAROLD J. BOREANAZ
Attorney for Defendant
Office & Post Office Address
736 Brisbane Building
Buffalo, New York 14203

TO: UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

HON. RICHARD J. ARCARA
United States Attorney for the
Western District of New York

HON. GERALD J. HOULIHAN
Assistant United States Attorney for
the Western District of New York

*Notice of Motion and Affidavit Pursuant to
28 USC 2255, September 6, 1975*

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

FREDERICO G. RANDACCIO

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

HAROLD J. BOREANAZ, being duly sworn, deposes and says:

That he is counsel for the defendant, FREDERICO G. RANDACCIO, and makes this application on his client's behalf, for an order pursuant to Title 28 U.S.C. 2255, vacating the original sentence imposed by this Court and directing a resentence of the defendant herein, on the ground that such original sentence was contrary to law. In support of this application, your deponent states as follows:

FIRST: No previous application for the relief herein requested has been made by or on behalf of the defendant Randaccio to any Court or Judge thereof.

SECOND: By indictment returned the 18th day of August, 1967, (Appendix A), the defendant Randaccio and four co-defendants were charged in this Court with two crimes of Conspiracy. By the first count of the indictment he was charged with Conspiracy under Title 18 U.S.C. 1951, and by the second count of the indictment he was charged under the General Conspiracy Statute, Title 18 U.S.C. 371 with Conspiracy to Trans

*Notice of Motion and Affidavit Pursuant to
28 USC 2255, September 6, 1975*

port Stolen Property in Interstate Commerce in violation of Title 18 U.S.C. 2314.

THIRD: After trial by Jury, a verdict was returned on the 21st day of November, 1967, finding the defendant Randaccio and his co-defendants guilty on each count.

FOURTH: On the 11th day of December, 1967, the Court sentenced the defendant Randaccio on both counts, imposing a term of 20 years imprisonment on the first count and five years imprisonment on the second count and directing that the terms be served concurrently.

FIFTH: The defendant Randaccio is presently incarcerated in the United States Penitentiary at Danbury, Connecticut, pursuant to the aforesaid judgment of conviction.

SIXTH: Pasquale A. Natarelli was a co-defendant in the indictment hereinabove mentioned.

SEVENTH: In September, 1974, said co-defendant, Natarelli, commenced proceedings to vacate his sentence, pursuant to the same statutory authority under which I now move on behalf of defendant Randaccio.

EIGHTH: The aforesaid proceedings culminated in an opinion by the United States Court of Appeals for the Second Circuit on May 14th, 1975 a copy of which is attached hereto and made a part hereof. (Appendix B).

NINTH: The defendant Randaccio was sentenced by the same Judge,

*Notice of Motion and Affidavit Pursuant
28 USC 2255, September 6, 1975*

on the same indictment, after a joint trial, on the same date and given the exact same sentence, as the defendant Natarelli.

WHEREFORE, the defendant Randaccio respectfully requests that an Order be entered pursuant to the provisions of Title 28, U.S.C. 2255, vacating the sentence herein imposed upon him by the HON. JOHN O. HENDERSON, on the 11th day of December, 1967, and directing that the defendant Randaccio be returned for resentence after a review of the pre-sentence report and allocation, upon the ground that the original sentence imposed was in violation of the laws of The United States.

Harold J. Boreanaz
HAROLD J. BOREANAZ

Sworn to before me this
6th day of *Sept.*, 1975.

Betty L. Pace

BETTY L. PACE
Notary Public, State of New York
Commission Expires 12/31/76
New Canaan, Conn. 06840

ORDER OF RE-SENTENCE, DECEMBER 1, 1975

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES

- vs -

CR: 1967-115

FREDERICO G. RANDACCIO

Gregory A. Baldwin
Department of Justice Attorney
318 Federal Building
Rochester, N.Y. 14614
Attorney for United States

Boreanaz, NeMoyer & Baker
716 Brisbane Building
Buffalo, N.Y. 14203
Attorneys for defendant

The defendant by motion papers filed November 6, 1975 has applied to this court to vacate a sentence imposed on the defendant by the late Judge Henderson of this court. The defendant was convicted and sentenced by Judge Henderson on December 11, 1967 on two counts of a two-count indictment. The matter came on for argument before the undersigned on November 24, 1975. On due consideration it is hereby

ORDERED, there being no opposition by the government, that the sentence herein imposed by the late Judge Henderson on December 11, 1967 wherein the said Frederico G. Randaccio was sentenced to a term of twenty years imprisonment under the first count of the indictment and five years imprisonment under the second count of the

Order of Re-Sentence, December 1, 1975

indictment, the terms to run concurrently, is hereby vacated on the ground that the sentences were unlawfully imposed, *Natarelli vs. United States*, 516 F.2d. 149.

IT IS HEREBY FURTHER ORDERED that the United States Marshal for the Western District of New York make arrangements to return the said Frederico G. Randaccio, from the United States Penitentiary, Danbury, Connecticut, where he is now serving said sentence, for re-sentence by this court at the United States Court House, Rochester, New York on December 22, 1975 at 10:00 A.M., after a review of the pre-sentence report and allocution.

HAROLD P. BURKE
United States District Judge

December 1, 1975.

SUPPORTING AFFIDAVIT ON BEHALF OF
 DEFENDANT-APPELLANT, DECEMBER 20, 1975
 UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

-vs-

Indictment No. 1967-115

FREDERICO G. RANDACCIO

Defendant

STATE OF NEW YORK)
 COUNTY OF ERIE) SS:
 CITY OF BUFFALO)

HAROLD J. BOREANAZ, being duly sworn, deposes:

1. I am the attorney for, and make this Affidavit on behalf of, FREDERICO G. RANDACCIO who was sentenced on the 11th day of December, 1967, under the first count of a two count indictment alleging a violation of Title 18 U.S.C. 1951, to a term of imprisonment of twenty years and under the second count of the same indictment for a violation of Title 18 U.S.C. 371, to a term of five years, said terms to run concurrently.

2. On December 1st, 1975, this Court entered an order vacating the aforesaid sentence and directing that the defendant be returned to this Court on December 22nd, 1975, for the purpose of re-sentence.

3. The defendant's trial in the Western District of New York, before the Honorable John O. Henderson, and a jury, commenced on October 26, 1967.

*Supporting Affidavit on Behalf of
Defendant-Appellant, December 20, 1975*

4. Approximately ten days prior to the commencement of this trial the Government turned over to trial counsel for the defendant, copies of transcripts of conversations which had been monitored by electronic surveillance during the month of February, 1965, in the apartment of one Darlene Grann located at 51 Essex Street, Buffalo, New York.

5. These transcripts included events occurring on the evening of February 5th, 1965.

6. Despite a lengthy trial, the only evidence connecting the defendant, FREDERICO G. RANDACCIO, with the conspiracies charged in the indictment was the testimony of an alleged co-conspirator accomplice by the name of Calabrese. He testified to certain conspiratorial conversations which, according to him, occurred at 60 Manchester Place in the City of Buffalo, New York on the evening of Friday, February 5th, 1965. Outside of the testimony of Calabrese with respect to what he claims he heard at this meeting there is no other testimony in the record connecting the defendant RANDACCIO with the commission of either of the crimes charged in the first or second count of the indictment.

7. The judgment of conviction herein was affirmed by the United States Court of Appeals for the Second Circuit on July 30th, 1968.

8. The defendant, herein, then petitioned for a Writ of Certiorari to the United States Supreme Court and that Court vacated the judgment and remanded the matter for a hearing to determine whether the prosecution's case was based upon tainted evidence resulting from electronic surveillances. (Giordano v. United States, 394 U.S. 310-1969).

9. The electronic surveillances in question were concededly illegal installations maintained by agents of the United States Government

*Supporting Affidavit on Behalf of
Defendant-Appellant, December 20, 1975*

by the means of trespass.

10. Upon remand by the Supreme Court, a hearing was held on August 27th and 28th, 1969, at Buffalo, New York, before the Honorable John O. Henderson.

11. On April 10th, 1970, the Honorable John O. Henderson entered an order determining that there was no evidence of taint produced at the hearing as a result of the illegal conduct by Government agents.

12. Your deponent has now discovered that the Government had subjected the defendant to illegal electronic surveillance at locations other than the premises at 51 Essex Street in Buffalo, New York.

13. Upon information and belief the Government has failed to ever disclose to anyone the existence of these additional transgressions of the defendant's Constitutional right by Government agents.

14. When this case was remanded by the United States Supreme Court it was the duty and obligation of the Government to advise fully and fairly the defendant and his counsel and the Court conducting the hearing of the existence of these additional illegal electronic surveillances by Government agents.

15. Upon information and belief the additional illegal electronic surveillances occurred during the very period of time set forth within the indictment as being the period of time during which the crimes at issue were committed.

16. In as much as the defendant is now about to be sentenced your deponent requests that prior to the imposition of sentence the Government be directed to make a full and complete disclosure to the defendant as to these additional illegal electronic surveillances so that the Court

*Supporting Affidavit on Behalf of
Defendant-Appellant, December 20, 1975*

can allow the defense an opportunity to comply with the full terms of the mandate of the United States Supreme Court.

17. At the time of the original sentence of the defendant it was not the practice of this Court to allow either the defendant or defense counsel to see the pre-sentence report submitted to the sentencing judge.

18. Your deponent has now had an opportunity to see the original pre-sentence report which constitutes the basis for the imposition of the severe sentence meted out by Judge Henderson.

19. Unfortunately, Judge Henderson had a distorted and unfair picture presented to him. Furthermore, the report contains numerous inaccuracies and information garnered by illegal means. This information was unquestionably used to the detriment of the defendant and in violation of his Constitutional rights.

20. In addition, your deponent received a copy of a letter dated December 15th, 1975, and made available to your deponent for the first time on December 18th, 1975, consisting of more than ten pages of textual material together with many additional pages of exhibits attached thereto and made a part thereof, all of which seek to influence this Court with respect to the imposition of sentence.

21. Because of the volume of material contained therein, and because of the multitude of alleged factual assertions put before this Court in an effort to influence sentence, and because of the shortness of the time of notice given to your deponent with respect to this material, I would respectfully request a full and fair opportunity to meet the issues raised in this letter and the attachments.

Supporting Affidavit on Behalf of
Defendant-Appellant, December 20, 1975

WHEREFORE, your deponent respectfully requests that these proceedings be adjourned and that the defendant be afforded a fair opportunity to be heard on the question of the sentence to now be imposed by this Court.

Harold J. Boreanaz
HAROLD J. BOREANAZ

Sworn to before me this

20th day of December, 1975.

Edgar C. NeMoyer

EDGAR C. NeMOYER
Notary Public, State of New York
Qualified in Erie County
* Commission Expires March 30, 1977

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TRANSCRIPT OF PROCEEDINGS,
DECEMBER 22, 1975

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA)	
)	
-vs-)	Cr: 1967-115
)	
FREDERICO G. RANDACCIO)	<u>RE-SENTENCING</u>
)	
Defendant.)	
)	
- - - - -	-)	

Before: Hon. Harold P. Burke, District Judge
Rochester, New York, December 22, 1975.

For the Government: James Gresens, Esq.
For the Defendant: Harold Boreanaz, Esq.

MR. GRESENS: Good morning, Your Honor.
United States versus Frederico G. Randaccio. Motion
for re-sentencing. Docket Number 1967-115. Your
Honor, the government has filed our letter with you.
The court also has a copy of the pre-sentence report.
We have nothing to add at this time.

MR. BOREANAZ: If Your Honor please. On
Friday of last week, I received a ten or twelve-page
letter the government submitted to the court, a supplement

Transcript of Proceedings, December 22, 1975

of the original pre-sentence report which was prepared for Judge Henderson. I have now had an opportunity to review the original pre-sentence report. As Your Honor knows, at the time of the gentleman's original sentence, it was not the practice of this court, or the Federal practice, generally, to allow defendants to see pre-sentence reports. In any event, his counsel, at that time, did not avail himself to so do. I have now had an opportunity to see, not only the original pre-sentence report, but the supplement which the government has put in. Those materials were available to me for the first time on Thursday of last week. Over the weekend, Your Honor, including yesterday, I worked at length to review those materials. And I find, unfortunately, that Judge Henderson had provided to him a considerable amount of inaccurate and distorted material in connection with the imposition of his original sentence. Furthermore, I found, Your Honor, that the government of the United States, violated the mandate of the United States Supreme Court when this case was returned originally on a hearing on the question of whether there was tainted, tenuous the original trial here, by virtue of illegal electronics surveillance

Transcript of Proceedings, December 22, 1975

by the government. The government had conceded that they had illegally subjected this defendant to electronics surveillance. By trespassory means over a period of some years. They conceded that a particular premises at Essex Street in the City of Buffalo was involved in that illegal electronics surveillance. Furthermore, the time period of the alleged commission of this crime, to wit, in 1965, was the same time period during which the government was conducting this illegal activity. Now, when the case was sent back on mandate, the government failed to disclose to the defendant the existence of the illegal electronics surveillances outside of the Essex Street premises. For these reasons, Your Honor, I now prepared an affidavit of mine, setting forth these facts, and others, which I believe justify the request that I am about to make to Your Honor. I have provided Mr. Gressens with a copy of this affidavit. I hand it to the clerk now, and ask Your Honor to accept this as a basis for my request for an adjournment of this sentence at this point so that we can meet these issues intelligently.

MR. GRESENS: Your Honor, I will make two points. First of all, in Paragraph "12" of this affidavit, which I have just received, Mr. Boreanaz says

Transcript of Proceedings, December 22, 1975

that there was electronic surveillance at locations other than 51 Essex Street. We have no affidavit or any other kind of material to substantiate this. The second point which I wish to make is that we are here this morning for re-sentencing in accordance with this court's order of December 1 of this year. And I would respectfully submit that any kind of litigation as to the wiretap that was litigated once before, before Judge Henderson, and motions for new trial were denied, is completely outside the scope of this proceeding this morning.

THE COURT: The question is, what is your attitude toward an adjournment.

MR. GRESENS: If the court would wish to grant one, Your Honor, it is certainly up to you, but, I would merely say that, even if what Mr. Boreanaz says is true, that there was electronic surveillance, it has nothing to do with the re-sentencing proceeding.

THE COURT: I will grant a short adjournment here. Wednesday of this week. That is the 24th at 12 o'clock noon.

MR. BOREANAZ: Would Your Honor accept this affidavit in support of this affidavit.

Transcript of Proceedings, December 22, 1975

THE COURT: Filed. And I suggest that you put something in writing as to your opposition to the motion.

MR. GRESENS: Yes, Your Honor.

THE COURT: Wednesday, 12 o'clock noon.

- - -

C E R T I F I C A T E

I, Louis Reznicoff, do hereby certify that I have recorded in shorthand the proceedings had in the within-entitled cause before the Hon. Harold F. Burke, United States District Judge, at Rochester, New York, and the foregoing is a true and correct transcript of my said shorthand notes.

Louis Reznicoff
Court Reporter

GOVERNMENT'S RESPONSE, DECEMBER 23, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

FREDERICO G. RANDACCIO

:
:
:
:
:

CR. NO. 67-115

GOVERNMENT'S ANSWER TO DEFENDANT'S
AFFIDAVIT OF DECEMBER 20, 1975

THE UNITED STATES OF AMERICA, by and through its attorneys, Richard J. Arcara, United States Attorney for the Western District of New York, and James W. Gresens, Department of Justice Attorney, hereby makes answer to the various claims made by the Defendant, through his counsel Harold J. Boreanaz, Esq., in his affidavit dated December 20, 1975.

The Government strongly opposes any further requests for adjournment in the instant proceeding, and in response to the claims raised in the aforementioned affidavit of the Defendant, the Government states the following:

Government's Response, December 23, 1975

POINT I

THE DEFENDANT'S ALLEGATIONS OF
ILLEGAL ELECTRONIC SURVEILLANCE
ARE COMPLETELY UNSUPPORTED.

In his affidavit, the Defendant states that he "has now discovered that the Government had subjected the defendant to illegal electronic surveillance at locations other than the premises at 51 Essex Street in Buffalo, New York." (paragraph 12, p. 3) (emphasis added)

First: The entire question of illegal electronic surveillance was exhaustively litigated before the late Judge John O. Henderson who found no evidence of any taint. Randaccio appealed from this determination, and the Second Circuit affirmed Judge Henderson's decision. United States v. Randaccio, 440 F.2d 1337 (2d Cir. 1971) (per curiam).

The Defendant has not offered any proof to demonstrate that he now possesses new information concerning illegal electronic surveillance which is in addition to that which has already been considered -- some four years ago -- by Judge Henderson and the Court of Appeals for the Second Circuit.

Second: The afore-quoted allegation of the Defendant (which appears in paragraph 12 of his moving papers) is completely unsubstantiated by any details or indications as to the source of

Government's Response, December 23, 1975

counsel's information. If counsel does indeed possess any direct evidence of illegal electronic surveillance, he has completely failed to set forth the source and basis of his evidence in his moving papers.

In cases involving allegations or denials of electronic surveillance, the Second Circuit has generally required an affidavit which contains some specificity. Cf. United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974).

For the foregoing reasons, the Government submits that counsel's bare allegation is insufficient to raise a cognizable claim of electronic surveillance.

POINT II

AN ALLEGATION OF ILLEGAL
ELECTRONIC SURVEILLANCE MAY
NOT PROPERLY BE RAISED IN THE
INSTANT PROCEEDING FOR RESENTENCING.

The instant proceeding comes before this Court on the Defendant's motion for resentencing in accordance with the Second Circuit's decision in Natarelli v. United States, 516 F.2d 149 (2d Cir. 1975).

Government's Response, December 23, 1975

The sole issue before this Court in Natarelli -- and in the instant case -- is a determination of an appropriate sentence "after review of the record and pre-sentence report and allocution." (516 F.2d at 153)

The Government has strongly argued that the Defendant has not properly supported his eleventh hour claim of illegal electronic surveillance. (See POINT I, supra) However, assuming arguendo that such a claim exists, the Government submits that it may not be properly raised in a proceeding to resentence the Defendant.

If credited, the Defendant's claim of illegal electronic surveillance goes to the legality of his 1967 conviction. But, only the issue of sentence is before the Court at this time. If the Defendant indeed possesses adequate and cognizable evidence of illegal electronic surveillance, this evidence should most properly be brought before this Court in a separate proceeding pursuant to 28 U.S.C. § 2255 or Rule 35 of the Federal Rules of Criminal Procedure.

*

*

*

In short, the Defendant should not be allowed to derail and delay this Court's determination of sentence merely by raising a totally unsubstantiated allegation of illegal electronic surveillance at the eleventh hour before his resentencing.

Government's Response, December 23, 1975

WHEREFORE, the Government respectfully requests that this Court deny any further motions for adjournment or relief in regard to the Defendant's claims of electronic surveillance, and that it grant unto the Government any further and appropriate relief which the Court deems in the interests of justice.

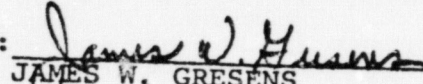
Respectfully submitted,

RICHARD J. ARCARA
UNITED STATES ATTORNEY
WESTERN DISTRICT OF NEW YORK

DATED: December 23, 1975

AT: Rochester, New York

BY:


JAMES W. GRESENS
Department of Justice Attorney

**SUPPORTING AFFIDAVIT ON BEHALF OF
DEFENDANT-APPELLANT, DECEMBER 24, 1975**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

Indictment No. 1967-115

vs.

A F F I D A V I T

FREDERICO G. RANDACCIO

Defendant

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

HAROLD J. BOREANAZ, being duly sworn, deposes:

1. I make this affidavit in opposition to the Government's position as reflected in a writing received on December 23, 1975, wherein the contention is stated that I have not recited with sufficient specificity the basis for my contention that the defendant was the subject of illegal electronic surveillance in addition to that occurring at the Essex Street address as set forth in my papers of December 20, 1975.

2. The Essex Street surveillance was assigned a code number by the Federal Bureau of Investigation. That number was BU-24-C.

3. The existence of this microphone device installed by trespass and without benefit of any court order was first disclosed just prior to the trial herein on September 19, 1967, by way of a letter by the Assistant United States Attorney, Andrew F. Phelan, in response to a defense motion.

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*Supporting Affidavit on Behalf of
Defendant-Appellant, December 24, 1975*

4. The following day on September 20, 1967, Assistant United States Attorney, Andrew F. Phelan, filed an affidavit in which he claimed that he was aware that the defendant was the subject of trespassory surveillance but stated that he had no knowledge of the material contained in certain logs which were prepared by the Government as a result of the aforesaid electronic surveillance.

5. By pretrial motion the defendant then requested disclosure of the monitored materials and a pretrial hearing to determine as to whether or not the Government's case was tainted as a result of the illegal conduct of the Government.

6. By an Order dated September 26, 1967, the Hon. John O. Henderson, ruled that a post trial hearing would be allowed. At the post trial hearing the court allowed the defense to see only the electronic surveillance logs for the month of February, 1965, dealing with the premises at Essex Street.

7. By pretrial application the defense sought a Writ of Mandamus from the Second Circuit Court of Appeals directing that a pretrial hearing be held and denying the Petition for Mandamus and a Per Curiam Opinion dated October 4, 1967. The Court stated:

So far as concerns defendants' rights to discovery under Rule 16, the Government has now agreed to make available the logs of the electronic surveillance during any relevant period.

We do not mean our denial of the Writ to be taken as necessarily sanctioning the postponement of determinations with respect to illegally obtained evidence until after the trial. This could well be unfair to a defendant unless the Government agreed, as it apparently has done here, that admissions of any material evidence found to have been obtained in violation of a defendant's

*Supporting Affidavit on Behalf of
Defendant-Appellant, December 24, 1975*

Constitutional rights shall require dismissal of the Indictment.

8. At the post trial hearing it was requested that all electronic surveillance logs be turned over to the defense. (R 811) Although it appears that all electronic surveillance logs had in fact been turned over to the Court during the course of the trial. (R 1568-1570).

9. Upon remand by the United States Supreme Court the Government fails to disclose that the defendant, Randaccio, was the subject of extensive additional illegal electronic surveillance. The electronic surveillance referred to in Paragraph "12" of my papers of December 20, 1975, are well known to the Government. Under code name BU-280-C, at premises located at the Memorial Chapel in Niagara Falls, New York, over a period of time from 1961 until July of 1965, and under a code name designed as BU-82-C, at premises located at Camilia Linen Supply in Niagara Falls during a period of time within the same perimeters, the defendant was the subject of extensive electronic illegal surveillance by the Government.

10. The existence of this illegal activity by the Government was disclosed in another totally unrelated case coming about after the incarceration of the defendant herein. This case is United States v. Magaddino, et al, which is docketed in the United States District Court for the Western District of New York under Indictment Number Cr-1968-196.

11. The scope and extent of the illegal conduct engaged by the Government set forth in full in a ten (10) page Opinion rendered on May 17, 1973, by the Hon. John O. Henderson, United States District Court Judge.

*Supporting Affidavit on Behalf of
Defendant-Appellant, December 24, 1975*

12. The installation at BU-280-C resulted in 104 volumes of transcript totally in excess of 76,000 pages. These transcripts represented a product of the microphone surveillance illegally conducted by Agents of the United States Government. The electronic devices in question were monitored continuously on a 24 hour a day basis. Tape recordings and daily logs were maintained which were regularly reviewed by Special Agents of the FBI. Reports were made from these logs and disseminated to various agencies throughout the country. Such reports made no mention of the electronic surveillance as the source of the information contained therein. "Channelizing" memoranda were made from such information and routed to various files. Information gained from such surveillance was provided to state and local police agencies via oral and written reports. Again, no indication was made concerning the source of such information. No records were kept as to who had access to the logs, tapes and other reports maintained by the FBI concerning this surveillance.

13. As counsel for a defendant in that case I had an opportunity to review the logs of the above mentioned installations and I can state without question that the defendant, Randaccio, was the subject of extensive illegal surveillance during the period of time that these installations were in existence. I do not now have access to these documents, but the Government does.

14. In addition to all of the aforesaid, I asked the Court to vacate the judgment of conviction upon the grounds that the Government has failed to disclose critical materials necessary for a proper defense of the case herein, has violated the mandate of the

*Supporting Affidavit on Behalf of
Defendant-Appellant, December 24, 1975*

United States Supreme Court, and in the alternative I request a hearing seeking now to properly establish the taint by use of the materials that should have been available to counsel many years ago that permeates the entire Government case.

15. I also wish to call to the attention of the Court that by pretrial motion the defendant, Randaccio, raised a challenge to the composition of the jury panel from which his trial jury was selected. At least fifty percent of that panel was composed of persons drawn from the Erie County Jury System. The contention was that that system resulted in an unconstitutionally constituted jury panel. Despite the fact that this issue was litigated at the time of the original trial herein and despite the fact that the Second Circuit Court of Appeals rules that the composition of the jury did not violate the defendant's constitutional rights this Court now has the benefit of complete hindsight the entire composition of the Erie County Jury Panel has been stricken down as unconstitutionally constituted. The automatic female exemption allowed by the County of Erie has now been stricken down as unconstitutional. Therefore, events subsequent to the original litigation herein, has proven the correctness of the position taken by the defense in the instant case. I therefor request that the judgment of conviction herein be vacated upon these additional grounds.

S/HAROLD J. BOREANAZ

Sworn to before me this

24th day of December, 1975.

PATRICK BAKER

TRANSCRIPT OF PROCEEDINGS ON
RE-SENTENCING, DECEMBER 24, 1975
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA)

- vs-)

FREDERICO G. RANDACCIO,)

Defendant.)

-----)

Cr: 1967-113

RE-SENTENCING

Before: Hon. Harold P. Burke, District Judge
Rochester, New York, Wednesday, December 24, 1975

For the Government: James W. Gresens, Esq.

For the Defendant: Harold Boreanaz, Esq.

- - -

THE COURT: I note the filing of an additional
affidavit of the defendant's attorney, filed today and sworn
today. I have examined the affidavit.

MR. BOREANAZ: Yes, Your Honor. Before we proceed,
and if we are to proceed to the actual sentencing, would
Your Honor rule on my request to --

THE COURT: I will. This proceeding concerns only

*Transcript of Proceedings on Re-Sentencing,
December 24, 1975*

the re-sentence of the defendant pursuant to the decision of the Court of Appeals for the Second Circuit in the United States against Natarelli. The validity of the conviction is not an issue in this proceeding. I decline to consider in this proceeding involving only re-sentence any evidence, such as claimed illegal electronic surveillance directed to the validity of the conviction. Particularly, I decline to direct the Government in this proceeding to "make a complete disclosure to the defendant" as demanded in Paragraph 16 of the Boreanaz affidavit, sworn to December 20, 1975.

I decline to further adjourn this re-sentence as demanded in the last paragraph of the Boreanaz affidavit.

So ordered. And I am filing the Order, with a copy to the defendant.

MR. BOREANAZ: I respectfully except, Your Honor.

Now, I'm directing myself directly to the question of sentence. As Your Honor knows, the late Judge Henderson imposed sentence in this instance. As Your Honor also knows, I had a long association with Judge Henderson, both on and off the bench, and I knew him well. I think one of the cardinal virtues that he possessed was the ability to recognize the possibility that he may have made a mistake and to do what he could to rectify it.

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I would like to call to Your Honor's attention, and hindsight always being twenty-twenty vision, and it is easier to look back retrospectively sometimes and put a thing into perspective.

I have researched every reported decision between 1950 and 1974 in the Second Circuit dealing with the Hobbs Act situation. I cannot find a single solitary instance other than this one wherein on a pure conspiracy alone, without the commission of any substantive act, a maximum sentence was handed out.

I could provide the Court with citations with respect to all of these cases; however, I submit it would probably serve no useful purpose except as to attract the Court's attention to the uniqueness of this particular peculiar situation wherein on an overall picture instances of violence to persons, instances of actual commissions of substantive crimes in multi-count indictments resulted repeatedly over and over again in lesser sentences.

Three persons alleged by the Government to have been the actual planned participants in the crime alleged here are all out of prison now. The only act that the Government claims that this defendant participated in was a planning at the original stage, and the Government's proof concedes that

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those plans changed after the conspirators left the City of Buffalo and after they arrived in California, and that the plan was aborted, and nothing ever occurred. No one was hurt. No one was injured. There was no close proximity to the commission of any form of actual substantive crime.

The defendant, Your Honor, as you know, he was born in 1907. He is sixty-eight years old. He is now looking for, tomorrow, to his ninth consecutive Christmas in custody.

He was raised from aged three to aged twelve in the City of New York. The family then moved to Buffalo. He was one of sixteen children born to his mother. A total of six are now surviving.

In 1930 he was in difficulty at the age of twenty-three with State authorities. He was convicted, and he served his time in connection with that. There has been no subsequent convictions of this man up until the time that he appeared before Judge Henderson for conviction.

His father was deported in 1935 and did not regain entry to this country until 1948. From 1948 until 1961, when his father died at the age of eighty-one, and the year previous his mother had died at the age of seventy-four, this defendant was the supporting factor insofar as his parents were concerned, and he looked out for their economic well being

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and their sustenance.

All of the surviving sisters, and there are four, through their formative years, he participated in their upbringing. They all have good families. They are all married. None of them are in any way involved in any form of criminal activity. And he participated in his only brother's upbringing. He is without criminal conviction.

He has one son who is college educated, and by all reports has an excellent reputation in the community. He is here in court today. All of these members of the family that I have mentioned to you are here in court today.

He has three grandchildren, one of whom is now attending college. These children have shown good signs of becoming law-abiding citizens, and in many respects this emanates from this defendant who stands before you.

The probation report indicates that he had a verified legitimate source of employment for more than four years prior to the time that he was sentenced. And I take it that had they chosen to have gone back further, they would have verified back further.

He filed and paid income taxes on fourteen to fifteen thousand dollars worth of income on each of those previous years, and there is nothing to refute that, and it would have

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been easily refutable if it were not true.

For thirteen years prior to the time that he was convicted, he and his wife lived together. They have been together since 1927 when they were married. For thirteen years prior to his conviction, they lived in a modest apartment, a six-room apartment at 562 Richmond Avenue. I am very familiar with that neighborhood, having been born and raised myself in that neighborhood. It is a modest middle-income type of neighborhood. There was no flourish. There was no show of opulence. There was nothing to indicate in the man's background the various occurrences that the public media has attributed to him. He has never had an opportunity to meet these things in the open.

Your Honor knows from the other comments that I make in my moving papers with respect to the Government's illegal electronic surveillance of this man over a period of more than five years, during which time he was never arrested. He was never accused of anything of an unlawful nature. He never had an opportunity to meet any of the accusations that were lodged against him, all emanating from publicity-seeking sources, which the man never had an opportunity to confront.

The Government filed some additional claims that they have informant information with respect to his contended

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efforts to take over a union in the event that he gets out of jail. These are just additional means of the Government to try to continue his incarceration.

They cite in their supplemental report to Your Honor one Russell DeCecco, and they advised the Court that in support of Russell DeCecco's credibility, that he testified in two trials, but the Government does not tell Your Honor that he was the central witness in each of those two trials, and in each case the jury chose to disbelieve Mr. DeCecco.

The Government does not tell you of the terrible background and the deceitful dealing of Mr. DeCecco, wherein he was out at Government expense, pretending that he was acting as an agent for the Government, and all the while committing additional crimes. In one instance without the knowledge of the Government while receiving pay from the Government, he received the sum of fifty thousand dollars on some stolen bonds.

These are the kinds of sources that the Government brings in to seek to influence this Court in connection with the sentence of this defendant. The Government does not tell Your Honor that the defendant's institutional record is of the highest quality. The Government does not tell Your Honor the latest report that I have from the United States Depart-

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ment of Justice, Bureau of Prisons, wherein the report from Danbury, and this report is dated May 28, 1975, and this is the most up-to-date report they have. They say he has maintained an infraction free conduct record, that he responds well to authority, and is considered a very cooperative inmate.

The Government does not advise the Court that on two separate occasions now the parole authorities have violated their own guidelines and has violated their own standards, and the Government does not advise this Court that Judge Newman in Connecticut has at least once sent back for further review proceedings before the parole authorities because the parole authorities did not follow their own rules in connection with considering the continuance of this man's incarceration.

The Government does not advise Your Honor that according to the guidelines now in existence, and granting the salient factor score that this man has, which is a salient factor score of six, and giving him a very high severity rating, that the guidelines call for twenty to twenty-six months of incarceration. This man is now four or five times beyond the guidelines that are now being set up on a national basis for incarceration for this kind of thing.

I ask Your Honor to look at the people who are in the

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courtroom. And I wouldn't hesitate, Your Honor, if I were speaking to Judge Henderson, to say, "Your Honor, I'm sorry you made a mistake when you imposed this severe sentence." The three people who the Government claims were going to commit the crime are now all out of prison.

The Government does not tell Your Honor that despite the fact that they have known from the beginning that this defendant had maintained his innocence throughout all of these years, and with all of their informer programs and everything else, they have never found one single additional shread of evidence to support the concept that he was, in fact, guilty. To the contrary, the evidence that has been developed through means of the limited access that counsel have had to electronic surveillance logs indicates to the contrary that there is a possibility that he might not have been guilty.

I understand through the technical ramifications that because of his counsel's desire to enter into a stipulation at the time of the trial he has been foreclosed from raising this by way of a new trial application and that has been ruled on by the courts. But I simply point that out to Your Honor in an effort to try to give a full, rounded picture to the posture of this defendant.

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I said I would not hesitate to say to Judge Henderson, "I believe, sir, that you have imposed a sentence that was too harsh." And from the recitations that I have set forth in the papers that I filed today, I know what Judge Henderson's attitude was about the illegal electronics surveillance that was engaged in, and I know that as years went on, and you will note the opinion of his that I quote from was in 1973, and it was not until then that Judge Henderson first became aware of the enormity of the atrocities that had been committed by Federal agents by way of violent invasions of personal liberties, that he then chose to grant a motion to dismiss the other case that resulted in the disclosure. And I know, Your Honor, that this defendant was subjected to the same things, because I had an opportunity to see those logs and to go over those with Judge Henderson, so I know, Your Honor, that his attitude in 1973 was substantially different than his attitude was in 1967.

I ask Your Honor to do full respect to his judgment. I ask Your Honor to consider also his mercy-dispensing side, his humanness in an attempt now to reflect upon what he would have done if he were here.

I thank you, Your Honor.

MR. GRESSENS: I will just address myself briefly to

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what Mr. Boreanaz said.

The Second Circuit Court of Appeals in the Ntarelli case directly pointed out, I believe, that Judge Henderson's intent would be entitled to some substantial consideration, and Mr. Boreanaz has addressed himself to that issue at some length.

I would like to direct this Court's attention to a decision by Judge Henderson, which was rendered on July 22nd of 1971. This decision was based on a motion by Mr. Randaccio's then counsel for reduction of sentence. In that case, just as Mr. Boreanaz has here this morning, the defendant pointed out the lengthy brief which had been prepared concerning cases meted out in similar crimes wherein the penalties may have not been quite as substantial as they were here. Judge Henderson considered that, and after reviewing this brief and other papers submitted, he denied the defendant's motion at that time for reduction of sentence.

I would suggest, Your Honor, that this speaks very plainly of what Judge Henderson's intent was some four years after the time of conviction.

Next, Mr. Boreanaz points out that there was no violence involved in this case and that the conspiracy did not come to the moment of execution. I direct the Court's

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attention to the motion papers, a letter which I filed in this case in which the Second Circuit Court of Appeals sets forth the facts as they were developed at the original trial, and I suggest that these facts show that all the participants, the three participants who were engaged in the crime, were at the situs, and they were armed with their keys and all the other sundry items necessary for completion, and it was only through inadvertence and facts beyond our control that this entire crime was never committed.

As the electronics surveillance in the Maggadino case, I simply point out that Judge Henderson's ruling in this case was on a completely separate set of individuals and has no relationship to the proceeding here today.

As to Mr. Randaccio's good penal record, we take no issue with what Mr. Boreanaz has said, but I simply point out that the Board of Parole has denied him parole, and if Mr. Boreanaz wishes to question this, the proper proceeding would be to bring a motion before Judge Newman in Connecticut.

That concludes the Government's presentation.

THE COURT: I have relied heavily on the information provided in the pre-sentence reports in this case, which have been available to this defendant. I am prepared to re-sentence now.

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In compliance with Rule 32, I ask the defendant personally, do you wish to make any statement in your own behalf or to present any information in mitigation of punishment? You don't have to, but I have to afford you the opportunity to do so.

DEFENDANT RANDACCIO: What did he say?

MR. BORLANAZ: Your Honor, he is hard of hearing.

He asked you if you wanted to say something.

DEFENDANT RANDACCIO: Yes. I have a prepared statement here, Your Honor.

Your Honor, I'm going to try to make myself as plain as possible. I am not much of an educated man, but I am going to try my best to have you understand what I'm about to tell you, in a prepared statement. And if you would, I would like to read it to Your Honor.

Today I am here before you on an illegal sentence to be corrected by the honorable Judge.

I have been incarcerated eight calendar years going on nine. At this point the Government got its "pound of flesh" and justice has been served.

I am not bitter at no one. I am sixty-eight years of age with very few years to spare. At this time before Your Honor, I pray that you will send me home to my ailing

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wife of fifty years as of last month. She is at present under doctor's care and putting necessary surgery off as long as she can, always in a position of a critical attack, and just waiting for my return home before going through with it, even though she is at the danger age of sixty-six.

Your Honor, I have three grandchildren, which I have not seen for eight years, and the oldest is attending medical school.

My son and his wife are both college graduates, with the highest degrees and well respected in the community.

Your Honor, what I am trying to tell you, if Your Honor sends me home to my beloved family, I will not be any problem in the future to anyone. It is too late in life to be an old fool, especially to betray my wife and cause her any more shame and grief, and to my grandchildren who will have to carry the name in the future.

As you look in the courtroom, you shall see many faces of my sisters and husbands, hard-working men, all married and in their sixties. At this moment you will notice they are praying that you will send me back home to my family. We are a loving family, and the last words upon my mother's death was to make sure we stay that way.

Your Honor, I pray you send me back with them, so

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that we can be united once more with my loved ones.

Thank you, Your Honor, for letting me take up your valuable time. Merry Christmas, and may God bless you with good health. Thank you.

THE COURT: Counsel, do you want to make any statement?

A. BOREANAZ: No, Your Honor, except to advise Your Honor that insofar as the material contained as coming from confidential informers in the supplemental report filed by the Government, the Court should know that we hotly contest that, we state to Your Honor that that material is not accurate and is not truthful. The Government does not disclose the sources of its information so that it is difficult to attack its credibility. But I do advise Your Honor that that information is not accurate, is not truthful and is distorted.

I also would like to advise Your Honor that the original pre-sentence report as filed here contains a number of deletions and omissions which create an entirely different picture than that which, in fact, existed. For example, Your Honor, there is a reference to an arrest of this defendant in 1933 involving Sparks Dairy, and the report shows that he was tried, that the jury disagreed and that the charge was then dismissed. The report does not advise Your Honor, however, that after the jury disagreement, the State authorities

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discovered that a terrible mistake had been made, that it was a case of mistaken identity and the true perpetrator of the crime in question was, in fact, arrested, did, in fact, confess, did, in fact, plead guilty and that this was an occurrence that occurred earlier in this man's life.

And there are other areas in the report, Your Honor, that seem to call into question the accuracy and authenticity of what the defendant's prior employment was. There is no question, Your Honor, that he was, in fact, prior to that gainfully employed and that he did, in fact, file proper income taxes on those employments and that that was a legitimate source of income that he had shown for a number of years prior to the time that he was sentenced.

So since Your Honor is relying on these reports, I feel obligated to call Your Honor's attention to the position that we take with respect to the illegal electronic surveillance, the fact that Judge Henderson did not know that the sources of some of the information contained in these reports had come from these sources.

And we take the position, Your Honor, that under the authority of United States versus Tucker, which may be found at 404 U.S. Page 443, and it is a Supreme Court decision decided in 1972. "It is appropriate for the sentencing judge

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to know of the illegality of material contained in a pre-sentence report."

And I submit that this pre-sentence material that Your Honor has does contain illegal information and that by virtue of our inability to have the electronic surveillance logs presented, we are unable to point out to Your Honor wherein that information lies. And so I feel, Your Honor, that is to our detriment, and I feel Your Honor should have the benefit of that material.

THE COURT: The two sentences imposed by the late Judge Henderson on the defendant on December 11, 1967, are hereby vacated. I impose herewith a single sentence of twenty years of active as of December 11, 1967.

MR. BOREANAZ: Would Your Honor consider the application of Title 18 4208(a), in other words, an "(a)" letter?

THE COURT: Giving authority to the Parole Board when he shall be eligible for parole?

MR. BOREANAZ: Yes, that's right, Your Honor.

THE COURT: Yes. I will make the sentence under that section, and leave it entirely up to the Parole Board as to when he shall be eligible for parole.

Under the original sentence, he would have been eligible in the third of the term, and that would be this

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month, wouldn't it?


MR. BOREANAZ: Yes, Your Honor.

THE COURT: So the Parole Board will have it anyway, if they haven't had it already, and they will have complete authority -- well, as I figured it out, it would be this month anyway, having served a third of his sentence.

MR. BOREANAZ: That is my understanding, Your Honor.

C E R T I F I C A T E

I, A. Jacobson, Official Court Reporter, for the United States District Court for the Western District of New York, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared under my direction.



A. Jacobson
Official Court Reporter

Date: December 29, 1975

ORDER APPEALED FROM,
DECEMBER 24, 1975
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES

- VS -

CR: 1967-115

FREDERICO G. RANDACCIO

Proceedings at re-sentence on December 24, 1975.

This proceeding concerns only the re-sentence of the defendant pursuant to the decision of the Court of Appeals for the Second Circuit in United States vs. Natarrelli.

The validity of the conviction is not an issue in this proceeding. I decline to consider in this proceeding involving only re-sentence, any evidence, such as claimed illegal electronic surveillance, directed to the validity of the conviction. Particularly I decline to direct the government in this proceeding to "make a complete disclosure to the defendant" as demanded in paragraph 16 of the Boreanex affidavit sworn to December 20, 1975. I decline to further adjourn this re-sentence, as demanded in the last paragraph of the Boreanex affidavit.

SO ORDERED.

HAROLD P. BURKE
United States District Judge

December 24, 1975.

NOTICE OF APPEAL,
DECEMBER 30, 1975

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

.....

UNITED STATES OF AMERICA

vs.

FREDERICO G. RANDACCIO

Cr. 1967 - 115

NOTICE OF APPEAL

.....

NOTICE IS HEREBY GIVEN that the defendant Frederico G. Randaccio hereby appeals to the United States Court of Appeals for the Second Circuit from the Sentence, Judgment of Conviction, and Order of the Court herein made and entered on December 24, 1975, at Rochester, New York, by the Honorable Harold P. Burke.

Dated: Buffalo, New York
December 30, 1975

BOREANAZ, NeMOYER AND BAKER

By Harold J. Boreanaz
A Member Of The Firm

Attorneys for the Defendant
Frederico G. Randaccio
Office and Post Office Address
736 Brisbane Building
Buffalo, New York (14203)